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JUN 10 2015

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Eastern Region

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 27-7568)

In the name of the Tanner Lane Ranch)

**RESPONSE TO PETITION
FOR RECONSIDERATION**

_____)
A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side
Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2 and
Minidoka Irrigation District (collectively referred to as "Coalition") respond to the Petition for
Reconsideration filed on behalf of Tanner Lane Ranch LLP (Applicant).

INTRODUCTION

On May 13, 2015, the hearing officer in this matter issued a Preliminary Order Denying

Permit. The Hearing Officer found that the Applicant did not meet its burden of proof pertaining to the provisions of Idaho Code § 42-203A(5)(a), which requires the Applicant to establish that the proposed use will not reduce the quantity of water under existing water rights. If there is a finding that the use of the water right under the Application will reduce the quantity of water under existing water rights, the Application may be rejected or may be partially approved, or may be granted upon conditions. Idaho Code § 42-203A(5).

The Applicant filed a Petition for Reconsideration (*Petition*), making four (4) main arguments:

1. The Hearing Officer did not rely upon the “McVay Memo” in the manner in which the Applicant intended. The McVay Memo was Applicant’s exhibit. Ex. 104-106.

2. Even though the Applicant did not put on any direct evidence concerning mitigation to the ESPA, Applicant desires that the Hearing Officer extrapolate information from the evidence that was presented and determine that appropriate mitigation exists.

3. The Hearing Officer should allow a credit to the Applicant for conveyance losses in the Blackfoot River.

4. Rather than deny the Application, the Hearing Officer should partially approve the Application and grant a permit for a smaller quantity of water than applied for or grant a permit with conditions.

It is the position of the Coalition that the Hearing Officer correctly concluded that the Applicant did not meet the Applicant’s burden of proof, that the Hearing Officer properly denied

the Application, that the Hearing Officer could not have partially approved the Application due to the failure of the burden of proof, and that the Hearing Officer properly exercised discretion by not granting a permit with conditions. The findings of the Hearing Officer are supported by the record, including the testimony of the Coalition's expert witness, Greg Sullivan. The Petition for Reconsideration should be denied.

ARGUMENT

The McVay Memo was Properly Utilized by the Hearing Officer; the Applicant Failed to Establish Adequate Mitigation

Applicant elected to offer into evidence the McVay Memo in support of the Application. As acknowledged by the Applicant, the McVay Memo analyzed water bank applications pertaining to two (2) wells. Applicant admits that it chose not to "redo the McVay analysis to show results from pumping from the single, closer well." *Petition* at p. 7. Rather, the Applicant decided that, although the McVay Memo was not "an exact analysis of 27-7568, it was introduced at the hearing as evidence of the close connection between the Blackfoot River and the Applicant's proposed point of diversion under 27-7568." *Ibid.* "It was submitted as evidence of the strong hydraulic connection between the well and the Blackfoot River, not the exact quantification of that connection." *Ibid.*

Although the Applicant acknowledges that the Hearing Officer has the discretion to consider evidence in the record and make conclusions from that evidence that are different than the stated purpose for introduction of the evidence, after reviewing the decision, the Applicant believes that the Hearing Officer did not use the McVay Memo appropriately. *Petition* at p. 7.

The Applicant then argues that the McVay Memo can be used to “reach an alternative conclusion finding no injury to the ESPA or the Snake River.”

However, the Hearing Officer correctly found that the only evidence in the record directly addressing the timing, location, and quantity of depletion of any source is the McVay Memo.

Preliminary Order at 5 (¶ 6). The Applicant does not like this finding and argues that, since the Applicant only seeks to pump from the closer of two (2) wells reviewed in the McVay Memo, “it is reasonable to conclude that the hydraulic connection between the well and the Blackfoot River would actually occur sooner than calculated under McVay’s analysis.” *Petition*, at p. 7. Yet, there is nothing in the record to support this conclusion. Rather, the Applicant specifically chose not to amend or “redo the McVay analysis to show results from pumping from the single, closer well.” *Ibid*.

The Applicant takes exception to the statement by the Hearing Officer that the McVay Memo is the only evidence in the record addressing “timing, location and quantity of the depletion.” *Petition* at p. 8. Although the Applicant cobbles together various items it believes could lead to a different conclusion, the Hearing Office properly concluded that the record does not support the Applicant’s claim that impacts to the ESPA are mitigated by the proposed actions.

By the Applicant’s own admission, the Applicant elected to rely upon the McVay Memo and elected not to present into evidence a different report describing only the well identified in the Application. Absent additional evidence, the only conclusion that could be drawn by the

Hearing Officer was that the McVay Memo set forth the only analysis concerning the timing, location and quantity of depletions to the aquifer. The Hearing Officer did not err in making this finding.

The Hearing Officer Correctly Found That Incidental Recharge Could not be Used for Mitigation Credit

The Hearing Officer found that instream losses occurring up stream of the existing points of diversion are incidental to the delivery of water right 27-13B and cannot be used in a mitigation plan to offset depletions to the ESPA. *Preliminary Order* at 6 (¶ 17). This is correct – whether a water right is diverted or not does not change the incidental losses occurring to the point of diversion. The Hearing Officer further found that recharge can't occur downstream of the authorized points of diversion because that area is a gaining reach of the Blackfoot River. *Preliminary Order* at 6 (¶ 17). Finally, the Hearing Officer found that there is no evidence in the record supporting the assertion that additional recharge will occur if the right is not diverted in the month of October. *Preliminary Order* at 6 (¶ 18). Applicant argues that these findings are incorrect.

Applicant relies upon the testimony of Ernest Carlsen, who took measurements on one (1) day, March 17, 2015, and found at two (2) points in the river there was a loss of approximately 1.25 cfs. According to the Applicant, this “demonstrates that the river is a losing reach at this location.” *Petition* at pp. 11, 12. This is the only evidence relied upon by the Applicant to show losses in any particular section of the river. Measurements were taken one (1) day in one (1) small area. Indeed, when questioned on this point, Mr. Carlsen testified at hearing that he had

not been tasked by the Applicant with taking any measurements other than those taken on March 17, 2015. Applicant did not produce any measurements that were taken during the irrigation season nor did Applicant present any evidence on how the reach is affected when pumping does not take place when compared to when pumping is taking place (pumping has been taking place for many years at this location).

Applicant's biggest hurdle was created by the attachments to Applicant's Exhibit 102, indicating that the flow of the aquifer moves away from the Blackfoot River. See Exhibit 102, Attachments 2, 5, 6, 7. This Exhibit demonstrates that the aquifer in this location is not flowing back into the Blackfoot River, and that any depletion in this area will result in a depletion in the water flowing westward in the ESPA. Not only was this fact supported by Applicant's Exhibit, it was supported by the opinion of the Coalition's expert, Greg Sullivan. The Applicant did not provide any evidence or testimony to dispute this conclusion.

The Hearing Officer correctly found that there is a depletion to the ESPA resulting from Applicant's pump. The Hearing Officer correctly found that Applicant should not be allowed credit for incidental recharge resulting from conveyance losses in the Blackfoot River. The findings of the Hearing Officer concerning these issues should not be changed.

The Hearing Officer has no Duty to Create a Mitigation Plan for the Applicant

The Applicant argues that the Hearing Officer should consider partially approving the Application and granting a permit for a smaller quantity of water or should grant a permit upon conditions. The Applicant makes no proposal concerning either theory, nor does the Applicant

cite any authority requiring the Hearing Officer to grant these alternative forms of relief. Rather, the Applicant acknowledges that the Hearing Officer “could” take these actions.

Petition at p. 18.

Since any depletion by the well at this location would result in a depletion to the ESPA, as found by the Hearing Officer, and since the Applicant failed to meet the Applicant’s burden of proof to show that it would not create a depletion to the ESPA, the Hearing Officer could not partially approve the Application and grant a permit for a smaller quantity of water than applied for. If water is being pumped from this well, unmitigated depletions will be occurring to the ESPA.

The Applicant’s argument that the Hearing Officer should grant a permit upon conditions is not supported by the evidence, and Applicant makes no proposal in the *Petition*. The Applicant does not point to any evidence in the record that would support conditions nor did the Applicant offer conditions at the time of hearing.

Furthermore, the Applicant failed to present any evidence that a smaller quantity of water would eliminate impacts to the ESPA. In truth, although a smaller quantity of water may reduce impacts as compared to the full diversion rate requested, there will still be impacts from the diversion that would go unmitigated.

It is interesting to note that the Applicant can legally use his existing Blackfoot River water right for the purpose intended – if the Applicant does not want to pump the water out of the Blackfoot River into a direct delivery system, the Applicant certainly could pump the water into a

pond and then pump the water from the pond. This would not require a ground water permit of any kind and so long as the Blackfoot River water right was in priority and the Applicant was not over diverting, there would be no injury resulting from either form of delivery.


Other than citing the wording of Idaho Code § 42-203A(5), the Applicant did not provide any authority that would require the Hearing Officer to take the alternative actions that are discretionary under the statute. The Hearing Officer is not required to partially approve the permit nor is the Hearing Officer required to grant a permit with conditions. The Hearing Officer did not commit error by refusing to grant this discretionary relief, especially in light of the fact that no evidence was presented that would support either theory of alternative relief.

CONCLUSION

For the reasons set forth, the Hearing Officer should deny the Petition for Reconsideration.

DATED this 5th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2015, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

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